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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

October Term 1973
No. 73-722

HOWARD WAYNE MOSTAD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

The petitioner, Howard Wayne Mostad, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on October 4, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The opinion and order rendered by the District Court, which is not reported, is also attached in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on October 4, 1973, and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a person is punishable for possession of a firearm under 18 U.S.C. App. §1202 who, having been convicted in state court of a felony, is, before the alleged possession, by written order of that same court, discharged from the conviction and restored "to all civil rights and to full citizenship with full right to vote and hold office the same as if said conviction had not taken place"?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment II.

A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. App. §1201. Congressional findings and declaration

The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—

(1) a burden on commerce or threat affecting the free flow of commerce,

(2) a threat to the safety of the President of the United States and Vice President of the United States,

(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

18 U.S.C. App. §1202. Receipt, possession, or transportation of firearms—Persons liable; penalties for violations

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both. . . .

Definitions

(c) As used in this title—

(2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less. . . .

18 U.S.C. App. §1203. Exemptions

This title shall not apply to—

(1) any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison; and

(2) Any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

Minnesota Statutes §609.165 Restoration of civil rights

Subdivision 1. When a person has been deprived of his civil rights by reason of conviction of a crime and is thereafter discharged, such discharge shall restore him to all his civil rights and to full citizenship, with full right to vote and hold office, the same as if such conviction had not taken place, and the order of discharge shall so provide.

Subd. 2. The discharge may be:

(1) By order of the court following stay of sentence or stay of execution of sentence; or

(2) By order of the adult corrections commission or youth conservation commission prior to expiration of sentence; or

(3) Upon expiration of sentence.

Subd. 3. This section does not apply to a forfeiture of and disqualification for public office as provided in section 609.42, subdivision 2. Laws 1963, c. 753.

STATEMENT OF THE CASE

Petitioner Howard Wayne Mostad was convicted, upon a plea of guilty, of a felony under Minnesota law on October 26, 1967, and placed on probation.

On January 7, 1972, probation having been successfully fulfilled, the judge of the same court entered an order discharging Petitioner from this conviction and expressly providing that he be "restored to all civil rights and to full citizenship with full right to vote and hold office *the same as if said conviction had not taken place*," as permitted by Minnesota Statutes §609.165. (Emphasis supplied.) (The order is included in the Appendix hereto.)

Thereafter, on June 13, 1972, the firearms for possession of which he was indicted were seized from Petitioner's possession.

The matter was submitted to the District Court without a jury upon stipulated facts, (it also being stipulated that Appellant was in possession of the two firearms in question and that they had moved in interstate commerce; the remaining counts of the thirteen count indictment were dismissed by agreement). Petitioner was found guilty and sentenced to two years on each count, the sentences to run consecutively and not concurrently.

The Eighth Circuit Court of Appeals affirmed, holding that despite the Minnesota court's order Petitioner was federally culpable since he had not complied with the exemption provisions of 18 U.S.C. App. §1203(2). The Court acknowledged, however, that this "result may seem confusing and harsh." (See opinion in the Appendix.)

REASONS FOR GRANTING THE WRIT

IT VIOLATES THE PRINCIPLES OF DUE PROCESS OF LAW, FUNDAMENTAL FAIRNESS AND FEDERALISM TO PUNISH A MAN FOR POSSESSION OF A FIREARM AS A FELON WHEN BEFORE THAT POSSESSION HE HAS BEEN EXPLICITLY INFORMED BY WRITTEN ORDER OF THE STATE COURT WHICH CONVICTED HIM THAT HE HAS BEEN DISCHARGED AND RESTORED TO ALL CIVIL RIGHTS AND FULL CITIZENSHIP "THE SAME AS IF SAID CONVICTION HAD NOT TAKEN PLACE"; IT IS ESSENTIAL THAT THIS COURT FURTHER CONSTRUE AND EXPLICATE 18 U.S.C. APP. §1202 TO PREVENT SUCH UNFAIRNESS.

As a "last-minute amendment" to the Omnibus Crime Control and Safe Streets Act of 1968, Congress hastily enacted Title VII, including 18 U.S.C. App. §1202, which forbids convicted felons to possess firearms, as a measure against organized crime, assassination of public figures and dangers to business on a scale affecting or threatening interstate commerce. So recognized this Court in *United States v. Bass*, 404 U.S. 336, 334-345 (1971), resolving the ambiguous interstate commerce requirement of the statute against the Government. The *Bass* opinion examines both the language and the legislative history of the statute in depth, and from that study emerge these conclusions:

Section 1202 was, as we have said, an amendment hastily passed with little discussion, no hearings and no report, 404 U.S. at 344, the legislative history is therefore meager, 404 U.S. at 345, the legislative intent unclear, 404 U.S. at 346; the section is not "carefully molded", not a product of "the model legislative process," 404 U.S. at 343-344; predictably, there-

fore, it is ambiguous in some important respects, "not a model of logic or clarity," 404 U.S. at 347;

This ambiguity, in turn, (as regards the commerce requirement), might have effected a "significant change in the sensitive relation between federal and state criminal jurisdiction" if the Government's reading were accepted, 404 U.S. at 349;

Accordingly, this Court resolved the ambiguity in favor of the accused because of "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should," 404 U.S. at 348, because, that is, the statute violates this desideratum:

> [A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. 404 U.S. at 348.

To be sure, in *Bass* the Court was speaking of the statute's commerce requirement; we submit, however, that the defects in the statute's classification of felons are at least as great, and the application of the foregoing principles even more forceful as applied to this Petitioner and others similarly situated. It cannot be said that due process of law has been accorded this Petitioner, that he ignored a "fair warning", that federal-state comity is respected where a federal judge tells him he must spend four years in prison as a direct result of a state conviction from which a state judge formally told him he was discharged and restored to *all* civil rights "the same as if said conviction had not taken place". Surely this is unfairness of the sort that the *Bass* Court foresaw when, speaking of the statute's application in states which (like Minnesota) do not themselves forbid felons to possess firearms, it said:

> Since ex-offenders in these states are limited only by the federal gun control laws, the notice problem of that law may be quite real. 404 U.S. at 348 Note 15.

It *is* a notice problem. Petitioner does not proffer ignorance of the law as a defense, but rather *knowledge* of the law as embodied in his reasonable understanding of the state judge's order. The Court of Appeals as much as acknowledged this in describing its own action as confusing and harsh. Other lower courts have reached similarly confusing and harsh results in related contexts. For example:

In *United States v. Glasgow*, 478 F. 2d 850 (1973), the Eighth Circuit Court held that one may be a felon under §1202 even though his sentence on a state felony automatically rendered it a gross misdemeanor conviction under Minnesota law. (The same Court held in *United States v. Wiley*, 478 F. 2d 415 (1973) that no specific knowledge of the illegality of possession need be proved under §1202.)

In *United States v. Two Revolvers and One Shotgun*, 313 F. Supp. 216 (W.D. Washington, N.D. 1970), it was similarly held that a misdemeanor disposition of a felony charge did not remove the conviction from the operation of §1202's definition of "felony." See also *United States v. Pederson*, 359 F. Supp. 1151 (D. Minnesota 1973).

In *United States v. Liles*, 432 F. 2d 18 (9th Cir. 1970), a §1202 conviction was affirmed even though the prior felony conviction had been reversed, after the alleged firearm possession.

To the contrary, and we believe better reasoned, is *United States v. One Lot of Eighteen Firearms*, 325 F. Supp. 1326 (D.C.N.H. 1971), a forfeiture action (under 18 U.S.C. §924 (d)), holding that a felon who had been pardoned *after* the alleged possession of a firearm, but whose pardon did *not*

contain the express authorization required by 18 U.S.C. App. §1203, was nevertheless exempt since:

> The failure of the pardon to expressly state that Briand is authorized to carry firearms is not controlling. 325 F. Supp. at 1328.

The judge held that the pardon although without the authorization had "the *practical effect* of excusing a violation of the Gun Control Act," 325 F. Supp. at 1329 (emphasis supplied), adding:

> Certainly, Congress could not have intended that this court require forfeiture of a man's property when he comes before the court fully pardoned from the single felony conviction twenty-five years ago that resulted in an unwitting and unintended violation of the Gun Control Act. A technical violation of the law should not be used to deprive a person of his property when he has been pardoned of the offense which gives rise to a violation of the law. Requiring forfeiture under these facts would not only be unjust, but would also raise serious constitutional questions of due process. 325 F. Supp. at 1329-30.

The seriousness of the injustice, of course, is only enhanced where it is Petitioner's liberty rather than his property which is deprived. The Eighth Circuit Court's opinion, if allowed to stand, will perforce punish this Petitioner for conduct which he not only had no notice was unlawful, but which a reasonable construction of the state court's order advised him was lawful. This manifestly does violence to the federal-state balance, ignoring as it does the state court's order which in turn is based upon the state legislature's determination of the procedure best suited to promote rehabilitation of its convicted felons. (See Advisory Committee comment to §609.165 in Minnesota Statutes Annotated, Vol. 40, p. 170). This is con-

trary to the spirit which informs the *Bass* decision, a spirit this Court has refused to dilute. See, among recent decisions, *Rewis v. United States*, 401 U.S. 808, 811 (1971); *Erbenbach v. United States*, —— U.S. ——, 93 S. Ct. ——, 34 L. Ed. 2d 446, 452 note 21 (December 12, 1972); *Heublein v. South Carolina Tax Commission*, —— U.S. ——, 93 S. Ct. ——, 34 L. Ed. 2d 472, 478 (December 18, 1972); *United States v. Enmons*, —— U.S. ——, 93 S. Ct. ——, 35 L. Ed. 2d 379, 389 (February 22, 1973).

The unfairness results from the ill-considered statute itself; it is awkward at best and questionable logically as well as legally to give *state* governors the responsibility to authorize firearm possession under *federal* law, as §1203 purports to do. Nor is this necessary to §1202's purpose; both legally and logically it is sounder simply to rely upon state law to determine if the state convict is a felon and if he is dispossessed of the right to bear arms.

Because of the vagueness in the genesis and language of §1202, because of its widespread use by federal prosecutors, because of the confusion and harshness and conflict in the lower court's decisions, and because of the unfairness to persons such as Petitioner who may be punished without notice of the illegality of their conduct, this Court should review the Circuit Court's decision and construe the statute.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Dated October 23, 1973.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 3-72 Crim 144

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HOWARD WAYNE MOSTAD,

Defendant.

OPINION AND ORDER

Robert G. Renner, United States Attorney, 596 U.S. Court House, Minneapolis, Minnesota 55401, by Joseph T. Walbran, attorneys for plaintiff.

Thomson, Wylde & Nordby, Suite 1530, 55 East 5th Street, St. Paul, Minnesota 55101, by Douglas W. Thomson and Jack S. Nordby, attorneys for defendant.

This matter now comes before the Court for a decision on the issue of whether a person is subject to indictment, conviction and punishment under 18 App. U.S.C. § 1202(a)(1) (hereinafter referred to as § 1202(a)(1))[1] for possession of

[1] § 1202. Receipt, possession, or transportation of firearms — Persons liable; penalties for violations

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

a firearm by a felon, when prior to the date of the possession he has been, by Court Order, discharged from the probation imposed upon the felony conviction and "restored to all civil rights and to full citizenship with full right to vote and hold office the same as if said conviction had not taken place."

The defendant was charged in the indictment with 13 counts of unlawful possession of a firearm by a felon under § 1202 (a)(1). The defendant was tried to the Court without a jury upon stipulated facts on September 20, 1972. The facts stipulated to were that defendant had actually possessed the 13 firearms, discovered in his house at 2747 Jackson Street, Little Canada, Minnesota, on June 13, 1972, which served as the basis for the indictment referred to above. It was also stipulated that all 13 firearms had moved in interstate commerce at some time prior to defendant's possession of them. It was further stipulated that defendant was convicted of Burglary, a felony, on October 26, 1967, that he was thereafter placed on probation, and that on January 7, 1972, a Minnesota District Judge ordered that defendant be "discharged from probation, restored to all civil rights and to full citizenship with full right to vote and hold office the same as if said conviction had not taken place."

Defendant has now moved the Court for a judgment of acquittal on the grounds that the Court Order of January 7, 1972, referred to above, exempts him from punishment under § 1202(a)(1). Plaintiff opposes this motion claiming that said order does not in any way change the fact that defendant is a felon within the meaning of § 1202(a)(1), and that, as a result, defendant is subject to the proscription of that statute.

Defendant was restored to all his civil rights under M.S.A.

§ 609.165 (hereinafter referred to as § 609.165).[2] He claims that since this statute replaced earlier statutory provisions[3] which made restoration of civil rights a matter of gubernatorial discretion, the exemption provisions of 18 App. U.S.C. § 1203[4] (hereinafter referred to as § 1203) is satisfied by the operation of § 609.165 the same as it would be by a gubernatorial pardon. Assuming, without deciding, that the operation of § 609.165 is the same as a gubernatorial pardon, it still does not follow that § 1203 is satisfied. Section 1203(1) is clearly not applicable here. Section 1203(2) requires that in order for there to be an exemption from § 1202(a)(1) there must be a pardon *and* an "*express authorization* to receive, possess or transport in commerce a firearm." (Emphasis supplied.) There is no evidence that defendant ever received such express authorization.

However, defendant claims that such authorization is, or should be considered to be, included within the restoration "to

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[2] § 609.165. Restoration of civil rights.

Subdivision 1. When a person has been deprived of his civil rights by reason of conviction of a crime and is thereafter discharged, such discharge shall restore him to all his civil rights and to full citizenship, with full right to vote and hold office, the same as if such conviction had not taken place, and the order of the discharge shall so provide.

Subd. 2. The discharge may be:

(1) By order of the court following stay of sentence or stay of execution of sentence; or

(2) By order of the adult corrections commission or youth conservation commission prior to expiration of sentence; or

(3) Upon expiration of sentence.

Subd. 3. This section does not apply to a forfeiture of and disqualification for public office as provided in section 609.42, subdivision 2. Laws 1963, c. 753.

[3] These earlier statutory provisions were M.S.A. §§ 610.41-.46 which can now be found in the notes following 609.165.

[4] § 1203. Exemptions

This title shall not apply to—

(1) any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison; and

(2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

all civil rights" of § 609.165. The Court disagrees with this position, feeling that it is clear that there must be an express authorization to receive, possess or transport a firearm in addition to a restoration of civil rights under § 609.165 in order for defendant to come within the exemption of § 1203 (2). This interpretation is not only required by the clear language of § 1203(2), but is supported by the legislative history of § 1203.[5]

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[5] The present 18 App. U.S.C. §§ 1201-03 were introduced as an amendment to the Omnibus Crime Control and Safe Streets Act of 1968 by Senator Long on May 17, 1968. At that time and on May 23, 1968, Senator Long explained the purpose and the hoped for effect of his amendment. On May 17, 1968 Senator Long, in explaining the present § 1203, stated that:

> When a man has been convicted of a felony, unless—as this bill sets forth—he has been expressly pardoned by the President and the pardon states that the person is to be permitted to possess firearms in the future, that man would have no right to possess firearms. 114 *Cong. Rec.* 13868 (1968).

On the latter date, Senator Long stated that:

> It [§ 1202] would not apply to a person pardoned by a Governor or a President if the pardon *specifically provides* that he will have the right to carry firearms. He would then have that right. Otherwise he would not have it. (Emphasis supplied) 114 *Cong. Rec.* 14773 (1968).

Senator Long also had printed in the Record a prepared paper, part of which states that:

> Title VII would deny every assassin, murderer, thief and burglar of the right to possess a firearm in the future except where he had been pardoned by the President or a State Governor and has been *expressly authorized* by his pardon to possess a firearm. (Emphasis supplied) 114 *Cong. Rec.* 14773 (1968).

The above statement by Senator Long led to the following discussion with Senator McClellan:

> Senator McClellan: The thought occurred to me, as the Senator explained it, is that if a man had been in the penitentiary, had been a felon, and had been pardoned, without any condition in this pardon to which the able Senator referred, granting him the right to bear arms, could that man own a shotgun for the purposes of hunting?
>
> Senator Long: No he could not. He could own it, but he could not possess it.
>
> Senator McClellan: I beg the Senator's pardon?
>
> Senator Long: This amendment does not seek to do anything about who owns a firearm. He could not carry it around; he could not have it.
>
> Senator McClellan:Could he have it in his house?
>
> Senator Long: No he could not. 114 *Cong. Rec.* 14774 (1968).

See generally, 114 *Cong. Rec.* 13868-13871 and 14772-14775 (1968).

Defendant further claims that he can no longer be considered a felon since the aforesaid Court Order and § 609.165 provide that all his civil rights are restored "the same as if said [or such] conviction had not taken place." The Court does not agree that this is the effect of a restoration of civil rights under § 609.165. The Court feels that the language of that statute makes it clear that the person to be restored shall have certain civil rights he would have had had he not been convicted of a crime, but also that such conviction is not expunged, as it is under various other Minnesota Statutes[6] so as to have no legal existence. In other words, the Court finds that § 609.165 operates to restore certain of a convicted criminal's civil rights as if there had been no conviction, but does not eradicate that conviction as if it had never occurred.[7]

Therefore, since the defendant's burglary conviction was not eradicated, expunged, or set aside by the Court Order which restored his civil rights pursuant to § 609.165, the Court finds that he is still rightfully considered a felon and, this, is subject to the proscription of § 1202(a)(1).

Defendant further asserts that, even if the Court Order which restored all his civil rights pursuant to § 609.165 did not exempt him from the proscription of § 1202(a)(1) pur-

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[6] See, M.S.A. § 609.166 under which a conviction can be set aside and M.S.A. § 638.02 under which pardons and reprieves can be granted. § 638.02 provides, in part, that:

> Such pardon extraordinary, when granted, shall have the effect of restoring such person to all civil rights, and shall have the effect of setting aside the conviction and nullifying the same and of purging such person thereof . . . .

[7] *See, Morrissey v. State,* 286 Minn. 14, 174 N.W. 2d 131 (1970) in which the Minnesota Supreme Court held that the petitioner, a convicted burglar who had had his civil rights restored pursuant to § 609.165, should be given the chance to present a petition setting forth allegations of sufficient substance to justify the granting of a full evidentiary hearing on whether his conviction should be expunged from the record. It is obvious from this result, that the restoration of petitioner's civil rights under § 609.165 did not expunge the conviction as well. *Cf., Op. Atty. Gen.,* 218-G (November 23, 1948).

suant to § 1203(2) and did not effect an eradication, expunction, or setting aside of his burglary conviction, he cannot be punished under § 1202(a)(1) because Congress cannot properly "devise a class of felons which results in the ensnaring of persons from whom the disabilities of conviction have been removed by the very jurisdiction whose classification of punishment for crimes the [Federal] Government relies on in the first instance." Defendant goes on to explain this assertion as follows:

> Knowledge, actual or implied, of the criminal nature of one's conduct is generally a precondition to punishment. . . . [S]urely the principle which ascribes to all of us knowledge of the law is rebutted in circumstances such as these where the defendant had been informed, before the date of the alleged offense, that he was once again possessed of all his civil rights. In other words, he was entitled to rely upon the assurances of the Minnesota Court and quite reasonably to proceed in good faith upon the belief that the right to bear arms had been restored to him; although the definition of "felons" in § 1202 had been held a reasonable classification before *Bass*, . . . it would be unreasonable for the Federal Government to cast a net so all-encompassing as to ensnare those, who like this defendant, have been restored to the rights of which their status as felons once deprived them.

Defendant relies mainly on the following cases to support his position: *Morissette v. United States*, 342 U.S. 246 (1951); *Holdridge v. United States*, 282 F. 2d 302 (8th Cir. 1960); *Linde v. United States*, 13 F. 2d 59 (8th Cir. 1926); *State* v. *Runnels*, 203 Kan. 513, 456 P. 2d 16 (1969).

The Court has read and carefully considered all the cases cited by defendant, and especially those listed immediately

above, and has concluded that they do not support defendant's position. In one of the cases cited by defendant, *Morissette*, the Supreme Court recognized, as it has in other cases,[8] that while the general rule at common law was that scienter or criminal intent was a necessary element in the proof of every crime, such intent was often not required under modern statutory provisions.[9] The Court finds that criminal intent or guilty knowledge is not, and was not intended to be, required in order for there to be a violation of § 1202 (1)(1). This result follows from both the clear language of the statute[10] and the Congressional intent in enacting it,[11] and it is supported by *United States v. Crow*, 439 F. 2d 1193 (9th Cir. 1971), the only case the Court could find on point. In *Crow*, the Court held that §1202(a)(1) required no guilty knowledge or criminal intent, other than a knowing possession, receipt or transportation, stating that:

3. *Does the statute require knowledge or intent?*

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[8] *See, e.g., Shevlin-Carpenter Co. v. State of Minnesota*, 218 U.S. 57 (1910); *United States v. Balint*, 258 U.S. 250 (1922); *United States v. Behrman*, 258 U.S. 280 (1922); *United States v. Dotterweich*, 320 U.S. 277 (1943); *Williams v. State of North Carolina*, 325 U.S. 226 (1945).

[9] 342 U.S. at 258-60. This point was also made by then Circuit Judge Blackmun in *Holdridge, supra*, 282 at 308-10. *See also*, cases cited in note 12 *infra*.

[10] *See*, note 1 *supra*.

[11] When Senator Long submitted his amendment to the Omnibus Crime Control and Safe Streets Act of 1968 on May 17, 1968, he stated that:

> I have prepared an amendment which I will offer at an appropriate time, simply setting forth the fact that anybody who has been convicted of a felony . . . is not permitted to possess a firearm . . . . 114 *Cong. Rec.* 13868 (1968).

On May 23, 1968, when Senator Long's amendment was passed, he made the following remarks:

> What the amendment seeks to do is to make it unlawful for a firearm . . . to be in the possession of a convicted felon who has not been pardoned and who has therefore lost his right to possess firearms. 114 *Cong. Rec.* 14773 (1968).

See also, note 5 *supra* and 114 *Cong. Rec.* 13868-13871 and 14772-14775 (1968).

> The trial court held that it does not, except as the word "possession" imparts a knowing possession. We agree. Crow argues that the government must show that he knew that it was unlawful to possess the gun. The statute does not say so; it does not use the word "knowingly" or "intentionally" or "wilfully" or any other comparable word. On its face, it makes possession alone an offense. We know of no reason for reading guilty knowledge into the statute.[12]

It follows from the fact that no guilty knowledge or criminal intent is required for there to be a violation of § 1202(a)(1) and from the general rule cited by defendant that everyone is presumed to know the law, that defendant can violate § 1202 (a)(1) even if he had no guilty knowledge or criminal intent in regard to his receipt and possession of the 13 firearms.

The Court understands the defendant's basic claim to be that it is deceptive, unfair and unreasonable for the Federal Government to prosecute or punish him under § 1202(a)(1) after he has been restored to all his civil rights under § 609.165. However, the Court feels that it is not unreasonable for Congress to enact § 1202(a)(1), and it is not unreasonable for that law to be enforced against persons in defendant's position. This follows from the Court's earlier findings that § 609.165 clearly does not eradicate, expunge or set aside a conviction although it does restore certain civil rights lost upon such conviction, and that, even if a restoration of civil rights under § 609.165 is within the meaning of "pardon" in § 1203(2), § 1203(2) requires, in addition, an express authorization to receive, possess or transport firearms before a convicted felon has such rights.

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[12] 439 F. 2d at 1195. *Cf., Bryan v. United States*, 373 F. 2d 403 (5th Cir. 1967); *United States v. Fogarty*, 344 F. 2d 475 (6th Cir. 1965); *Sipes v. United States*, 321 F. 2d 174 (8th Cir. 1963).

Therefore, since the Court has found that the law is clear on these points and that defendant has received no such express authorization, the Court holds that the Federal Government can enforce § 1202(a)(1) against defendant without being deceptive, unfair or unreasonable.

For all the above reasons, defendant's motion for a judgment of acquittal is denied. Therefore, based on the stipulated facts and the decision on defendant's legal defense, the Court must and does find defendant guilty, as charged, of all 13 counts of the indictment.

MILES W. LORD
United States District Judge

Dated: December 4, 1972

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1208

UNITED STATES OF AMERICA,

Appellee,

v.

HOWARD WAYNE MOSTAD,

Appellant.

Appeal from the United States District Court
for the District of Minnesota

Submitted: September 13, 1973.
Filed: October 4, 1973.

Before Heaney, Stephenson and Webster, Circuit Judges.

HEANEY, Circuit Judge.

The defendant, Howard Wayne Mostad, was convicted on two counts of violating that provision of the Omnibus Crime Control and Safe Streets Act of 1968 which prohibits possession of a firearm by one who has previously been convicted of a felony.[1] He was sentenced to two years on each count; the sentences to run consecutively.

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[1] "(a) Any person who—
"(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, * * *

* * * * * * * *

"and who receives, possesses, or transports in commerce or affecting commerce, after the date enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."
18 U.S.C. App. § 1202(a)(1) (1968).

Mostad contends that "it is fundamentally unfair under historical and prevailing notions of due process of law" to apply the prohibition of this statute to him under the circumstances revealed by the record in this case.

Mostad was convicted in a Minnesota State District Court of a felony on October 26, 1967, and was thereafter placed on probation. On January 7, 1972, a Minnesota State District Judge ordered, pursuant to Minn. Sta. Ann. §609.165,[2] that he be "discharged from probation, restored to all civil rights and to full citizenship with full right to vote and hold office the same as if said conviction had not taken place."

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[2] "*Subdivision 1.* When a person has been deprived of his civil rights by reason of conviction of a crime and is thereafter discharged, such discharge shall restore him to all his civil rights and to full citizenship, with full right to vote and hold office, the same as if such conviction had not taken place, and the order of discharge shall so provide.

"*Subd. 2.* The discharge may be:

"(1) By order of the court following stay of sentence or stay of execution of sentence; or

"(2) By order of the adult corrections commission or youth conservation commission prior to expiration of sentence; or

"(3) Upon expiration of sentence.

"*Subd. 3.* This section does not apply to a forfeiture of and disqualification for public office as provided in section 609.42, subdivision 2. Laws 1963, c.753."

Minn. Stat. Ann. § 609.165 (1963).

Minn. Stat. Ann. §638.02 (1963) describes the process for obtaining a pardon. It provides in part:

"Subd. 2. Any person, convicted of crime in any court of this state, who has served the sentence imposed by the court and has been discharged of the sentence either by order of the court or by operation of law, may petition the board of pardons for the granting of a pardon extraordinary. If the board of pardons shall determine that such person has been convicted of no criminal good character and reputation, the board may, in its discretion, grant to such person a pardon extraordinary. Such pardon extraordinary, when granted, shall have the effect of restoring such person to all civil rights, and shall have the effect of setting aside the conviction and nullifying the same acts other than the act upon which such conviction was founded and is of and of purging such person thereof and such person shall never thereafter be required to disclose the conviction at any time or place other than in a judicial proceeding thereafter instituted."

Under §1202(a)(1), the government need not prove specific intent to violate the law or knowledge on the part of the defendant that he is violating the law. It must prove that the defendant knowingly possessed the firearm. *United States v. Earthia B. Wiley*, 478 F. 2d 415 (8th Cir. 1973); *United States v. Crow*, 439 F. 2d 1193 (9th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972). The government has met that burden here. Moreover, this Court upheld the constitutionality of this statute in *United States v. Mancino*, 474 F. 2d 1240 (8th Cir. 1973), and in *United States v. Synnes*, 438 F. 2d 764 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972).

The Act exempts from its provisions "* * * any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm." 18 U.S.C. App. §1203(2) (1968). The defendant is not such a person. He belongs to a general class of convicted felons whose civil rights have been restored by a statute that is silent with respect to the right of such persons to possess firearms. If the Congress desires to extend the exemption to persons in this class, it can do so; but we find no evidence of such intent in the language in the legislative history of the Act. See, *Stevens v. United States*, 440 F. 2d 144 (6th Cir. 1971).[3] This

[3] One District Court ruled that when a defendant had received a full pardon by the Governor and Governor's Council of New Hampshire.

> "The failure of the pardon to expressly state that Briand is authorized to carry firearms is not controlling. Briand was granted a *full* pardon by the Governor and Council of New Hampshire which I construe to mean that Briand is entitled to all the rights accorded any citizen, including the right to possess firearms.* * *"

United States v. One Lot of Eighteen Firearms, 325 F. Supp. 1326, 1328 (D.C. N.H. 1971) (Emphasis included).

result may seem confusing and harsh, but the classification established by Congress is, in our view, a reasonable one and cannot be overturned by us.

Affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

State of Minnesota Second Judicial District
County of Ramsey

STATE OF MINNESOTA,

Plaintiff,

vs.

HOWARD WAYNE MOSTAD,

Defendant.

RECOMMENDATION OF THE PROBATION OFFICER OF RAMSEY COUNTY AND ORDER OF THE COURT DISCHARGING PROBATIONER

TO THE COURT:

WHEREAS HOWARD WAYNE MOSTAD who was heretofore on the 26th day of October, 1967 duly convicted of the crime of Burglary, and placed on probation to the Probation Office of Ramsey County for a period of five years pursuant to the Order of the Honorable Leonard J. Keyes, Judge of District Court, whereby execution of sentence was stayed, and

WHEREAS, it now appears that HOWARD WAYNE MOSTAD has complied with all the terms and conditions of probation,

IT IS RECOMMENDED that HOWARD WAYNE MOSTAD be honorably discharged from probation.

Dated this 5th day of January, 1972.

By VITO MARASCUILO
Probation Officer

Approved by: WALT ALLBERG
Director, Adult Services

ORDER

Upon the foregoing recommendation, and upon all the files and records herein; the Court being duly advised in the premises,

IT IS ORDERED that HOWARD WAYNE MOSTAD is hereby discharged from probation, restored to all civil rights and to full citizenship with full right to vote and hold office the same as if said conviction had not taken place.

Dated this 7th day of January, 1972.

HYAM SEGELL
Judge of District Court

JOSEPH P. LANASA, Clerk of the District Court, Ramsey County, State of Minnesota, does hereby certify that the attached instrument is a true and correct copy of the original on file and of record in my office.

Dated this 19th day of September, 1972.

JOSEPH R. LANASA
Clerk of District Court
By Brian R. Jalito, Deputy
File No. 22305

SUPREME COURT, U. S.
FEB 5 1974
MICHAEL RODAK, JR., CLERK

No. 73-722

In the Supreme Court of the United States

OCTOBER TERM, 1973

HOWARD WAYNE MOSTAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-722

HOWARD WAYNE MOSTAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the District of Minnesota, petitioner, a previously convicted felon, was convicted on two counts of receiving firearms which had travelled in interstate commerce, in violation of 18 U.S.C. App. 1202(a)(1) (Pet. App. A1-A9). He was sentenced to two years' imprisonment on each count, the sentences to run consecutively. The court of appeals affirmed (Pet. App. A10-A13).

Petitioner was charged in the indictment with

thirteen counts of unlawful possession of firearms in violation of 18 U.S.C. App. 1202(a)(1).[1] The facts were stipulated at trial (Pet. App. A-2). Petitioner possessed the firearms, which had moved in interstate commerce, and they were discovered in his house on June 13, 1972. It was further stipulated that petitioner was convicted in Minnesota of burglary, a felony, and placed on probation. On January 7, 1972, a Minnesota State Court ordered, pursuant to a state statute permitting restoration of civil rights upon expiration of sentence (Pet. 5), that petitioner be "discharged from probation, restored to all civil rights and to full citizenship with full right to vote and hold office the same as if said conviction had not taken place" (Pet. App. A14-A15).

Petitioner contends that his conviction under 18 U.S.C. App. 1202(a)(1) is invalid because the state court order restoring his civil rights brings him within 18 U.S.C. App. 1203(2), which exempts from the coverage of section 1202(a)(1) "any person who has been pardoned by * * * the chief executive of a State and has expressly been authorized by * * * such chief executive * * * to receive, possess, or transport in commerce a firearm." This contention was thoroughly examined and properly rejected in the opinions of

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[1] Through an agreement with the government, petitioner was convicted and sentenced on only two counts (Pet. App. A-10. The district court opinion erroneously indicated that petitioner was found guilty on all thirteen counts (Pet. App. A-9).

both the district court and court of appeals, on which we rely (Pet. App. A1-A13).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 531608 165